ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee v. FRANK JARVIS ATWOOD, Appellant.	No. CR–87–0135–AP Pima County Superior Court Nos. CR14065 and CR15397 Ninth Circuit No. 14–99002 U.S. District Court No. CV–98–116–TUC–JCC REPLY IN SUPPORT OF MOTION TO MODIFY BRIEFING SCHEDULE/RESPONSE TO CROSS-MOTION TO VACATE BRIEFING SCHEDULE (Capital Case)

The State hereby replies in support of its Motion to Modify Briefing Schedule and responds to Atwood's Cross-Motion to Vacate Briefing Schedule (hereinafter "Response/Cross-Motion"). For the reasons stated below, this Court should grant the State's Motion to Modify and deny Atwood's Cross-Motion to Vacate. In the alternative, if this Court is not inclined to modify the briefing schedule, then staying, not vacating, that schedule is appropriate.

The State's motion concerns a narrow, statutory proceeding that is defined in mandatory language and limited to two specific procedural questions: has the prisoner's "conviction and sentence of death [been] affirmed and the first post-

conviction relief proceedings … concluded." A.R.S. § 13–759(A); *see also* Ariz. R. Crim. P. 31.23(b) ("On the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude."). If those conditions are met, then the Court "shall issue" the warrant of execution. A.R.S. § 13–759(A). Given the narrow inquiry here and the clear statutory directive, the schedule proposed by the State is reasonable and Atwood's arguments in response are legally irrelevant to this proceeding.

In any event, to the extent Atwood implies otherwise, the State acted in good faith by reporting to this Court the 90-day beyond-use date initially quoted by the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR's) compound pharmacist. That an expert retained by Atwood proposed a 45-day expiration date in connection with an earlier pleading is of no moment; disagreement between experts is not an unusual circumstance, and the State reasonably relied on a contrary expert opinion given to ADCRR. That expert's change in opinion (which, rather than Atwood's pleading, is the new information that warrants a finding of extraordinary circumstances, *see* Response/Cross-Motion, at 1, 12–13), occurred after this Court issued its briefing schedule; the State then disclosed the change and took corrective action. The circumstances and revised opinion are regrettable. Nonetheless, the change in opinion occurred and

was disclosed well in advance of the anticipated execution date, while there was still ample opportunity for course-correction.

Turning to the Response/Cross-Motion's merits, Atwood devotes abundant effort to attacking ADCRR's compound pharmacist, as well as ADCRR itself, and suggesting that the State's proposed procedure would violate a stipulated settlement agreement resolving a civil case by scheduling mandatory testing disclosure too close in time to this Court's ruling on the execution warrant. Response/Cross-Motion, at 2–12. The settlement agreement speaks for itself, and does not impose the requirements Atwood identifies; rather, it simply requires testing results within 10 calendar days of the State's filing of a motion for warrant of execution and does not address the timing of this Court's issuance of a warrant. Response/Cross-Motion, at Ex. B. Atwood's interpretation of the agreement thus finds no support in its text. Moreover, this Court is not the forum to construe the agreement or determine if a violation has occurred. Nor is this Court the forum for Atwood to litigate any concerns about the compound pharmacist's performance or seek to dictate the manner in which the pharmacist must compound the chemicals. Response/Cross-Motion, at 3–8.

The State's modification request was reasonable. This Court possesses the authority to shorten or lengthen ARCAP 6(a)(2)'s default time period of 10 days to respond to a motion. Rule 31.3(a) permits this Court to "suspend any provision of

[Rule 31] in a particular case, and may order such proceedings as the court directs." *See also* Ariz. R. Crim. P. 31.6(e) (incorporating ARCAP 6(a)(2) and (3) and 6(b)). Moreover, Atwood has possessed a draft of the State's motion for warrant of execution since April 6, 2021. *See* Motion for Briefing Schedule, filed 4/6/2021, at Ex. A. Thus, in reality, he will have had more than four months to draft his response if the State's Motion to Modify is granted. And as mentioned in the Motion to Modify, he will receive 13 additional days to draft the response under the proposed modified schedule than he would under the schedule currently in place. Motion to Modify, at 4.

Further, the State's proposed briefing schedule gives the State only one day to file a reply in support of its motion for warrant of execution, rather than the 5 business days it would have received under the Rule. *See* ARCAP 6(a)(2); Ariz. R. Civ. P. 6(a)(2). Unlike Atwood, who has received a draft of the State's motion, the State has no advance knowledge of the arguments Atwood will make in his response. The proposed briefing schedule therefore disadvantages the State—not Atwood. And as noted in both the State's Motion to Modify and its Motion for a Briefing Schedule, the question before this Court in deciding whether to issue an execution warrant is an exceedingly narrow one. *See* A.R.S. § 13–759(A); Ariz. R. Crim. P. 31.23(b).

Finally, if this Court denies the State's Motion to Modify the Briefing

Schedule, it should not vacate that schedule and require the State to start anew. Rather, it should stay the briefing schedule, and should direct the State to notify this Court and Atwood when additional testing is completed and disclose whether that testing supports a beyond-use date past 45 days. Even staying the briefing schedule, however, would impose significant costs. Doing so would add further uncertainty to the execution process and frustrate the victims' constitutional right to a "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. Art. 2, § 2.1(A)(10). The State therefore requests that this Court grant its Motion to Modify the Briefing Schedule and deny Atwood's Cross-Motion to Vacate the Briefing Schedule.

RESPECTFULLY SUBMITTED this 9th day of July, 2021.

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